DEPARTMENT OF PROPERTY.

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PITTSBURG & LAKE ERIE RAILROAD COMPANY *v.* BRUCE.[1]

Right of Way only over the Lands Appropriated.

The charter of the Pennsylvania & Ohio Canal Company provided that it might enter upon, take possession of, and use all such lands as might be necessary for the construction of its works, commissioners being authorized to assess damages, etc. The canal was further declared to be a public highway, whereon anyone might travel on payment of tolls. The stock was declared real estate, and the works were vested in fee in the stockholders as tenants in common. *Held*, that the company acquired under the terms of the charter a right of way only over the lands appropriated by them, and that they did not acquire said lands in fee.

AS TO RIGHTS ACQUIRED IN AND TO LAND TAKEN BY THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

The right acquired in land taken by the exercise of the right of eminent domain may be an easement or title in fee. Railway companies generally acquire only the right of way over and through the lands for the purposes of their road.

It is well settled that in the lands of individuals, laid out for public highways, in pursuance of our statutes, the public and public authorities acquire only an easement or right of way; a right to employ it for the purposes of constructing, maintaining and using a public highway thereon. The soil and freehold belong to the owners of the land, subject only to this easement. . . . . Under our laws a railroad corporation possesses, under the lease from the State, only an easement in the land over which its road may have been laid out and constructed, while the fee—the exclusive right of property—in the land, and the trees and herbage upon its surface, and the minerals below it, subject always to the easement of the railroad corporation, remain in the original owner: Blake *v.* Rich, 34 N. H., 282.

The charter of the Western Vermont R. R. Co. provided that the directors may cause such surveys of the road to be made as they

[1] Reported in 102 Pa., 23.

deemed necessary, and fix the line of the same, and that the company might enter upon, and take possession of, such lands as were necessary for the construction of their road and requisite accommodations. *Held*, that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a road-bed or stations than was really requisite for such uses; that the estate so requisite was not one in fee simple, but merely an easement; that when taken for such purposes, the rule was the same, whether the land was taken compulsorily by condemnation and the award of commissioners as to its extent and price, or under agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their roads and stations as they saw fit, and that so long as they acted in good faith, and not recklessly, their decision, as to the quanity of land required for depot accommodations, would be regarded as conclusive: Hill *v.* W. Vermont R. R., 32 Vt., 68.

A "right of way" in its legal and generally accepted meaning in reference to a railroad, is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase: Williams *v.* W. Union R. R. Co., 50 Wis., 71. See also Heard *v.* City of Brooklyn, 60 N. Y., 242; 20 Barb. (N. Y.), 644; West Penna. R. R. Co. *v.* Johnston, 59 Pa., 290; Phila. W. & B. R. R. Co. *v.* Williams, 54 Pa., 103.

The proprietor of the land retains his exclusive right to all its mines, quarries, springs of water, timber and earth for every purpose not incompatible with the right of way. This is the almost universal rule, where a sovereign imposes a public right of way upon the land of an individual: Lyon *v.* Gormley, 53 Pa., 261; Jackson *v.* Hathaway, 15 Johns, 447; Sanderson *v.* Haverstick, 8 Barr, 294.

Where the company have only an easement, the former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revests in the proprietor of the soil. The perpetual use of the land vested in the railway company, its successors and assigns for railroad purposes; the land owner had the right to enter upon such land if he did not interfere with the rights of the railroad company: Kansas Central Railway Co. *v.* Allen, 22 Kans., 285.

Under an act which authorizes the City of Baltimore to purchase or acquire property by condemnation, not for all purposes, but for "the purpose of conveying water into said city, for the use of said city and for the health and convenience of the inhabitants thereof," *Held*, that the city might acquire by condemnation of the bed of a stream, or water course, a right to the use of the water in perpetuity, but the use must be the one specified in the act, and there remains in the owner the right to such use of it as does not injuriously interfere with the city's use: Kane *v.* Baltimore, 15 Md., 240.

The right of way contemplated is that peculiar to a railroad, and includes all that is necessary and proper for the construction and

maintainance of a railroad over the premises. It is the right to freedom in locating, constructing and conveniently using and repairing the road and its appurtenances; and for such purpose only, of taking, removing and using materials on or from the land so taken. It contemplates the right to make cuts and embankments: Henry *v.* Dubuque & P. R. R. Co., 2 Ia., 288.

The title to the timber standing on land appropriated to a railroad company, under the provisions of the "Right of Way Act," remains in the owner of the soil; and the company have a right to take and remove only so much thereof as may be necessary for the construction and repair of the road and its appurtenances: Preston *v.* Dubuque & Pacific R. R. Co., 11 Ia., 15.

A deed was made to the Morris Canal and Banking Co., conveying all the interest and estate of the grantor in the lands and appurtenances to their only proper use, benefit and behoof, "as long as used for a canal." *Held*, that while the estate continues, and until the qualification upon which it is limited, is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple: State *v.* Brown, 27 N. J. L., 13.

The railroad company is entitled to timber to the extent that it is useful in the construction of the line of the road. The fee in the land is not acquired by the company, but a mere easement in such land. The title remains in the owner, the property being made servient to the purposes of the railroad. But it must be borne in mind that, in no condition of things, can the railroad company claim a right in the soil or trees, except to use them for the special purpose for which it was created; and if, from any cause, such materials have been made unserviceable for such purpose, its right to them is at an end: Taylor *v.* N. Y. & L. B. R. R., 38 N. J. L., 28.

And the railroad company may remove such material with a view of constructing its road, but such material cannot be sold to third parties: Aldrich *v.* Drury, 8 R. I., 554.

A railroad company may cut trees in constructing a telegraph line over and along its right of way: W. Union Tel. Co. *v.* Rich., 19 Kans., 517.

That the railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have at all times the right to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose. It is obvious that the right of the railway to the exclusive occupancy must be for all the purposes of the road, much the same as that of an owner in fee: Jackson *v.* Rut. & Bur. R. R., 25 Vt., 150.

One whose land has been taken by a railroad company, under their charter, for railroad purposes, has no right to enter upon or use such land for any purpose which, in the least degree, endangers or embarrasses its use by the company for any of the objects which the railway is intended to accomplish: The Con. & Pass. Rivers R. R. Co. *v.* Holton, 32 Vt., 43.

Although the right of a railroad company is but an easement, and not a fee, this does not preclude

their having sole and exclusive possession of the land while in the exercise of that easement. The fact that, upon the abandonment or surrender of their road and charter, the land would revert to the former owner, does not curtail their right to its exclusive use if necessary: Troy & Boston R. R. Co. *v.* Potter, 42 Vt., 265.

Land of a private citizen was taken for the construction of the Erie Canal, and used for a number of years, and afterward abandoned by the State, and the canal located in a different place. *Held*, that such land when no longer necessary for public use reverted to the original owner, although the Act under which it was taken declared it should vest in the State in fee simple: People *v.* White, 11 Barb. (N. Y.), 26.

Although the act of incorporation vests in the company title to the land over which the road passes, on compliance by them with the provisions of the act, such title must be considered as vested only for the purposes of a road, and when the road is abandoned the land reverts to the original owners: Hooker *v.* Utica Turnpike Road Co., 12 Wend. (N. Y.), 371.

But it is within the power of the State to authorize a change from one public use to another of a like kind: Malone *v.* City of Toledo, 28 O., 643.

And the presumption is against a fee: N. O. Pacif. Railway Co. *v.* Gay, 92 La. An., 471; City of Logansport *v.* Shirk, 88 Ind., 563.

In any case, however, an easement only would be taken unless the statute plainly contemplated and provided for the appropriation of a larger interest: Cooley's Const. Lim., 559.

In construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy the language and object of the act. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied by the taking of an easement: Wash. Cemetery *v.* Prospect Park Co., 68 N. Y., 591.

The charter of the Vermont Central Railroad Company provides that the company, upon complying with the condition upon which they may take land for their road, shall be "seized and possessed of the land." This does not make them owners of the fee, but gives them the right of way merely: Quimby *v.* Vermont Central R. R. Co., 23 Vt., 387.

The legislature may, when it deems it necessary, confer a power to take in fee simple: Prather *v.* W. Union Tel. Co., 89 Ind., 501; Water Works Co., *v.* Burkhart, 41 Ind., 364; Nelson *v.* Fleming, 56 Ind., 310; Dinley *v.* Boston, 100 Mass., 544; Cotton *v.* Miss. & R. R. Boom Co., 22 Minn. 372; New York & H. R. R., 46 N. Y., 546; Troy & B. R. R. *v.* Potter, 42 Vt., 265.

A fee may be taken although the public use for which the land may be taken is special and not of necessity permanent or perpetual. Where a statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose in view: Sweet *v.* The Buffalo, N. Y. & Phila. R. W. Co., 79 N. Y., 293.

Whenever the Commonwealth

took lands for permanent use under the Improvement Acts of 1825, 1826, 1827 and 1828, and similar acts, and constructed and operated a canal upon it, she acquired an estate in such land in perpetuity, and may dispose of the same in fee.

When land is procured for the building of a canal thereon the presumption is that the right of soil is acquired, and not a mere easement. The Commonwealth sold the canal to a corporation: *Held*, that the fee in the land occupied by the canal was in the Commonwealth and passed to the corporation, and that the former owner had no title to it nor to the coal under the canal: Wyoming Co. *v.* Price, 81 Pa., 156; Robinson *v.* R. R. Co., 22 P. F. S., 316; Union Canal Co. *v.* Young, 1 Whart., 410; Malone *v.* City of Toledo, 34 Ohio, 541.

Where a corporation is authorized to acquire land in fee, either by legal proceedings or purchase, the property so acquired may, by authority of the legislature, be devoted to a new and different public use, after the use for which it was originally acquired has been terminated; or the land may be aliened by the corporation. In such cases no right of property of any individual is violated. The original owner has no reversionary or other interest in the land: Heard *v.* City of Brooklyn, 60 N. Y., 242.

Wherever the Commonwealth, in the construction of her public works, acquires a fee simple in lands taken therefor, and land is devoted to that use, a cessation of that use would not revest the title in the former owner: Haldeman *v.* Penna. Cen. R. R. Co., 50 Pa., 425. See, also, Rexford *v.* Knight, 11 N. Y., 308; Pittsburgh & L. E. R. R. *v.* Bruce, 102 Pa., 23; Heywood *v.* Mayor, 7 N. Y., 314.

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DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

STATE *v.* KENYON.[1] SUPREME COURT OF RHODE ISLAND.

Evidence—Homicide—Threats.

Upon the trial of an indictment for homicide it appeared that the defendant, some time after a personal encounter with the deceased, had taken his position, rifle in hand, where he could see his victim but could

[1] Reported in 26 Atl. Rep., 199.